BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6822 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

SAMUEL PENN
(Claimant)

S.S.A. No.

PRECEDENT
BENEFIT DECISION
No. P-B-168

FORMERLY
BENEFIT DECISION
No. 6822

The claimant appealed from Referee's Decision No. SF-3589 which held that the claimant was ineligible for benefits for 26 weeks beginning August 21, 1966 through February 18, 1967 under section 1253(a) of the Unemployment Insurance Code. Oral argument was presented on behalf of the claimant.

STATEMENT OF FACTS

The claimant's regular and customary work for a number of years had been as a shoe salesman. The claimant is no longer able to perform such work as the result of two heart attacks. The claimant filed a claim for unemployment compensation disability benefits and received such benefits from February 13, 1966 through August 14, 1966 when his disability benefit award was exhausted. The claimant's physician released the claimant for light sedentary work in August 1966.

On or about August 22, 1966, the claimant telephoned the local office of the Department of Employment /now field office of the Employment Development Department/. He telephoned again in September, October, and November, 1966. Each time he requested information about unemployment insurance benefits. He explained that he was no longer able to perform his regular and customary work but that he had been released to perform light work. On

each occasion the claimant was advised that he was not eligible for unemployment insurance benefits and he was referred to the Department of Rehabilitation.

In February, the claimant was informed by a friend that he might be eligible for unemployment insurance. The claimant promptly came to the local office of the Department of Employment /now field office of the Employment Development Department/ on February 16, 1967 and filed a new claim which was given an effective date of February 19, 1967 with a weekly benefit amount of $47. The claimant requested that the effective date of his new claim be made August 21, 1966 so that his weekly benefit amount would be $65.

The claimant's testimony does not establish whether he specifically asked if he could file a claim for unemployment insurance benefits or if he merely asked about his eligibility for such benefits when he telephoned the local office in August, September, October and November, 1966. A representative of the department testified that it was the usual practice of the local office to assign employees on the rotational basis to accepting and handling informational telephone calls. If an individual telephoned to inquire about his eligibility under the claimant's circumstances, he would be informed that he would not be entitled to unemployment insurance and that he should contact the Department of Rehabilitation. He would not be told whether to file a claim or not to file a claim for unemployment insurance. These employees of the department are trained to give out general information and to try to answer questions as best they can in a general way. They are not to go into specific sets of facts.

In his oral argument, counsel for the claimant has very ably presented a review of the developments in the doctrine of estoppel which indicates some liberalization of the doctrine with respect to procedural matters. It is contended on the claimant's behalf that if eligibility for backdating the claimant's new claim does not exist under the specific regulations of the department, estoppel did exist. It is the position of the department that the claimant did not specifically ask about filing a claim for benefits, so that no false information was given to the claimant and no estoppel existed.

REASONS FOR DECISION

Section 1276 of the Unemployment Insurance Code provides in pertinent part as follows:

> "1276. 'Benefit year', with respect to any individual, means the 52-week period beginning with the first day of the week with respect to which the individual first files a valid claim for benefits. . . . As used in this section, 'valid claim' means any claim for benefits made in accordance with the provisions of this division and authorized regulations if the individual filing the claim is unemployed and has been paid not less than the minimum amount of wages in employment for employers necessary to qualify for benefits. . . ."

Section 1253(a) of the code provides as follows:

> "1253. An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that:
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> "(a) A claim for benefits with respect to that week has been made in accordance with authorized regulations."

The authorized regulations contained in Title 22, California Administrative Code, provide in pertinent part as follows:

> "1326-3. Filing a New Claim for Benefits. A new claim may be filed by any person who has become separated from his work or who is working on a part-time or reduced earnings basis on the effective date for which his claim was filed, and shall set forth that:
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> "(a) He has become separated from his work or is working on a part-time or reduced earnings basis;
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> "(b) He registers for work;
>
> "(c) He claims benefits;
>
> "(d) Such other information as the department may require."

"1253-8. Week--Delayed Filing Due to Coercion of Misinformation. (a) A week of unemployment of an individual who for one of the reasons listed in subdivisions (b) or (c) of this section delays filing his claim shall be the week in which he first becomes unemployed, provided, he files his claim not later than 13 weeks after the close of the benefit year in which the week of unemployment falls, but not later than the week following the week in which the individual is notified of his potential right to benefits, in accordance with the code and these regulations.

"(b) His employing unit warned, instructed, or coerced him not to claim benefits; or

"(c) The personnel of the department made misleading statements to him which caused the individual to fail to register for work or file a claim."

In Benefit Decision No. 6619 we had occasion to consider the term "good cause" used in section 1260 of the Unemployment Insurance Code. We held that since "good cause" was expressly provided as an excuse for failure to meet the reporting requirements of the code, incorporated by reference in section 1260 of the code, it was not necessary to rely upon the doctrine of estoppel in order to excuse a failure to meet such requirements. We recognized that the registration and reporting requirements of the code are mandatory and cannot be waived so that generally the failure to meet such requirements may be excused only on the basis of an estoppel. However, the express "good cause" provision in section 1260 of the code made a specific exception to the mandatory registration and reporting requirements. Therefore, we held that the claimant in Benefit Decision No. 6619 need not establish an estoppel but only good cause under section 1260 of the code.

We are considering an analogous situation in the present case. Although generally, the claimant's failure to file a claim would be excused only on the basis of an estoppel, the authorized regulations contain an express provision for backdating when misleading statements have been made to the claimant by personnel of the department which caused him to fail to register for work or file a claim. When the claimant telephoned on four different occasions and explained his personal circumstances, he was informed that he was not entitled to or

was not eligible for unemployment insurance benefits. Whether the claimant was specifically informed that he could or could not file a claim for benefits or whether he asked specifically about filing a claim we consider immaterial. "The law neither does nor requires idle acts." (California Civil Code 3532) Where an individual inquires about benefits and receives a negative reply it would appear useless for him to take further action.

The general information given by the department personnel was, in our opinion, at least misleading if not an actual misrepresentation of what the law provides. We have recognized that individuals who cannot perform their regular and customary work may still be considered eligible for unemployment insurance benefits if they are able to perform light work and there is a labor market for such work (Benefit Decisions Nos. 6027, 6335, and 6338). In addition, in Benefit Decisions Nos. 5117 and 6389, we recognized that an individual need not be able to work in order to file a valid new claim for unemployment insurance benefits. We distinguished the nature of the filing of a new claim for the establishment of a benefit year, which involves the securing of a computation of the potential maximum award and weekly rate payable based on base period wage credits, from the subsequent filing of the weekly claims seeking payment of the established weekly benefits or for waiting period credit. An individual who has had a spell of illness may well wish to preserve his entitlement to unemployment insurance benefits based on wage credits which he was able to earn and which he may be able to use subsequently when he has recovered or when he might be able to perform light work. By receiving general information to go to the Department of Rehabilitation rather than to claim benefits through the Department of Employment /now Employment Development Department/, individuals are being misled from filing claims to preserve their wage credits or to receive benefits for which they might well be eligible if they can perform light work. They also are being denied assistance in seeking and obtaining employment.

In the present case the claimant had been informed by his physician that he should perform light work. However, when he first inquired of the department, the claimant was given no suggestion that he might possibly attempt to preserve his wage credits or be eligible for benefits or that he might use the employment service facilities of the department in attempting to secure work.

Under these circumstances we hold that the claimant failed to file his claim because of misleading statements made to him by personnel of the department and that he established a week of unemployment beginning August 21, 1966 under the department regulations. Therefore, he is entitled to have his claim backdated to that time. It is not necessary that he establish an estoppel. We specifically do not decide any question with respect to the claimant's eligibility for weekly benefits in connection with the benefit year award thereby established.

DECISION

The decision of the referee is reversed. The claimant is entitled to have his new claim backdated to August 21, 1966.

Sacramento, California, January 6, 1976

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

By its action today, a majority of this Board embarks on a project of selecting from the 6800-plus benefit decisions adopted by the Board prior to 1968, some 600 decisions to be elevated to precedent decision status. I am the first to agree that the need for additional precedent decisions is long overdue. But I cannot concur with the "star chamber" like method being used by the majority in electing and anointing the cases. One Administrative Law Judge on the staff of the Board has been directed by the Chairperson to choose the cases. No input - either as to case selection or regarding the merit of any specific case as one of precedent value - from anyone else is permitted, let alone sought or solicited. From its lofty eminence in Sacramento, this Board proposes to issue the Law without benefit of assistance from any outside source (and, of course, by such an isolationist policy the Board likewise brooks no interference from any external source).

Even if the statutory authority of this Board clearly authorizes the consecrating of these ancient cases (and as I will demonstrate, infra, there is a serious question whether this Board has the power to act on matters in which the entire record has long since been irrevocably destroyed, as is true with regard to Benefit Decisions), I cannot ignore the unbroken line of recent court decisions mandating public notice and an opportunity to be heard before action is taken affecting "property." Precedent decisions of this Board are binding on Administrative Law Judges and the Department (Section 409, Unemployment Insurance Code). Thus, any person whose circumstances mirror those existing in a precedent decision will be granted or denied unemployment insurance benefits in accordance with the results of the precedent case.

Ordinarily, there is a modicum of input before a precedent decision is established, in that the Board has before it the entire record of the case, including the transcript of the hearing, the exhibits and any written briefs which may have been filed or oral argument that may have been presented. Moreover, if any

party is aggrieved by the Board's action, such party may obtain judicial review pursuant to the provisions of section 1094.5 of the Code of Civil Procedure. Thereunder, the Superior Court reviews the entire record and applies the independent judgement test, ascribing its own version of the weight to be given the evidence, and affording the parties a limited hearing de novo where circumstances so require.

As a practical matter, no such initial review is possible with respect to the Benefit Decision cases selected by the Board to be precedents. The records of all Benefit Decision cases have long since been destroyed, and no means exist for resurrecting any transcripts, exhibits, briefs, or even the decisions of the Referees who initially decided those matters. In many instances, the Benefit Decisions are 25 to 30 years old, and the claimants are long since deceased and the employers have disappeared from the business scene. And even if a real party did exist, there would be no record for a court to review.

Consequently, the Board majority is exhuming from the graveyard of ancient cases those Benefit Decisions which it, and it alone, feel should constitute binding precedents. This action is done absent any notice to anyone, without opportunity for comment from anyone, and, unfortunately, even without any questions or discussions from any Board member on the merits of those Benefit Decisions raised to precedent status today. All of this, I believe, transgresses the concept and notion of procedural due process of the law as articulated by the courts during the past half-dozen years.

The United States Supreme Court, beginning with Sniadach v. Family Finance Corporation (1969), 395 U.S. 337, and California cases based thereon, teach us that due process means there may be no deprivation of "property" unless such action is preceded by notice and an opportunity to respond, absent some "extraordinary" or "truly unusual" circumstances. (Goldberg v. Kelly (1970), 397 U. S. 254; Bell v. Burson (1971), 402 U.S. 535; Fuentes v. Shevin (1972), 407 U.S. 67; Morrissey v. Brewer (1972), 408 U.S. 471; Gagnon v. Scarpelli (1973), 411 U. S. 778; North Georgia Finishing Inc. v. Di Chem Inc. (1975), 419 U.S. 601; Randone v. Appellate Dept. (1971), 5 Cal. 3d 536; Brooks v. Small Claims Court (1973), 8 Cal. 3d 661; Adams v. Dept. of Motor

Vehicles (1974), 11 Cal. 3d 146; Skelly v. State Personnel Board (1975), 15 Cal. 3d 194). Recent cases have not retreated from that general rule, and have only moderated the pre-deprivement "hearing" requirement (Arnett v. Kennedy (1974), 416 U.S. 134; Skelly v. State Personnel Board,(supra).

From an examination of all these cases I am constrained to conclude that the type of precedent-setting action now being embarked upon by this Board will in many of the 600 or so instances result in a deprivation of "property" and therefore notice and an opportunity to at least offer comment are ingredients indispensable to a satisfaction of procedural due process requirements. There is a complete absence of safeguards to minimize the risk of error on the part of the Board. There is no external input, no transcript, no exhibits, and nothing to vouchsafe those who are subject to the Unemployment Insurance Program other than the personal propensities of three or four individuals. The surrounding circumstances do not necessitate immediate action. Quite the opposite, as these Benefit Decisions have lain dormant for as long as 30 years, and to delay action 60 to 90 days until notice is given and responses are received, is plainly reasonable. Each individual claimant and employer will be required to either seek declaratory relief or to completely litigate (from the Department to an Administrative Law Judge to the Board to the courts) each individual case, and substantial interim losses may be incurred by real parties in interest. All of these factors, when tested against the fabric woven by the courts, demonstrate the fatal flaws in the closed-to-the-public procedure adopted by the majority (Skelly v. State Personnel Board, supra, at 209).

In California Human Resources Development Department v. Java (1971), 402 U.S. 121, the Supreme Court left little doubt that unemployment insurance benefits are "property." The United States District Court had held that (1) California's failure to hold pre-deprivation hearings (before cutting off unemployment insurance benefits when an employer appealed after the claimant was originally found eligible by the Department) violated due process contrary to Goldberg v. Kelly, supra, and (2) the Department's application of section 1335 of the Unemployment Insurance Code constituted a failure to pay benefits "when due" within the meaning of section 303(a)(1) of the Federal Social Security Act. A majority of the United States Supreme Court adopted the second ground of the

District Court decision and thus found it unnecessary to reach the constitutional due process issue (see, however, the dissent by Mr. Justice Douglas, which agreed with the District Court on the constitutional issue). However, the majority of the Court left no real doubt that unemployment insurance benefits are "property," explaining that unemployment insurance is a substitute for wages (402 U.S. at 134). Wages universally have been held to be "property."

I proposed to my colleagues on the Board a procedure whereunder written notice of the Board's proposed action would be given to those who would most likely be affected thereby. Certainly, the Department should be placed on notice as to which of the hoary Benefit Decisions are proposed to be transformed into precedent status. The Department must deal with every conceivable type of situation, whereas we at the Board only receive appeals in some 18 percent of the cases that are appealed to an Administrative Law Judge from departmental action. Thus, the Department is in far the best position to know which factual situations are most needful and worthy of resolution by precedent decision. The Administrative Law Judges, who hear 100 percent of the appeals from Department determinations and rulings, and who are confronted daily with the necessity of fashioning a legal rationale to fit each factual matrix, are also in an excellent position to advise the Board as to the areas where precedent decisions could be used most propitiously. But both of these sources are rejected by the majority.

Organized labor has long given close attention to unemployment insurance law and places itself on record regarding the remedies that should be provided for employee problems as they arise. Without question, input from this source should be considered by the Board before action is taken. The same may be said for organizations of employers, such as the California Manufacturer's Association and the California Retailer's Association. Perhaps closest to the largest number of claimants are the publicly-funded legal assistance programs, such as Legal Aid Society offices in numerous localities, California Rural Legal Assistance, San Francisco Neighborhood Legal Asisstance, Western Center on Law and Poverty and others. Such programs offer viewpoints that should not be overlooked in the creation of precedent law.

The procedure could approximate that set forth in sections 11423-11425 of the Government Code pertaining to adoption of administrative regulations. Interested persons, organizations and their representatives would be given written notice of the Board's proposals for action, and would be afforded the opportunity, within a specified period of time, to submit statements, arguments, or contentions in writing. The Board would then consider all relevant material presented to it in timely manner. Such would appear to satisfy the judicial decisions cited above, would provide a large measure of fairness, and would chill the potentiality for arbitrariness (Rivera v. Division of Industrial Welfare (1968), 265 Cal. App. 2d 576).

Whereas a means is readily at hand to satisfy minimal requirements of procedural due process, were my colleagues willing to seek the advice of those who can help the Board to make informed judgements as to which Benefit Decisions most nearly solve the real-world problems extant today, more grave is the question whether the Board possesses the legal authority to reach into antiquity and give the breath of life to old Benefit Decisions as precedent decisions. This Board is a creature of legislative origin, and thus has no power or authority other than as may be conferred upon it by the Legislature. Our functions begin and end with, and are circumscribed by, the statutes.

Section 1336 of the Unemployment Insurance Code enjoins upon this Board the requirement that Board decisions must be based on the evidence presented in the case. Under section 409 of said code, the Board, "acting as a whole, may on its own motion reconsider a previously issued decision solely to determine whether or not such decision shall be designated as a precedent decision." (Emphasis added) The question arises as to the meaning of the words "previously issued decision" in section 409, when that section and its provisions are read in conjunction with section 1336. Do those words imply the limitation that the "previously issued decision" must have been a decision issued by the very same Board which is now determining whether to elevate it to precedent status? A sound legal argument can be made for that proposition. The extent of the Board's reconsideration is confined "solely" to the question whether the earlier-issued decision should be a precedent. This implies

that the merits of the case, and any concurring or dissenting opinions were considered and included at the time the decision was originally issued. Section 409 does not appear to leave room for anything more than the determination whether the previously issued decision should become a precedent, and does not seem to allow even one iota of change to the previously issued decision, or to permit the addendum of a concurring or dissenting opinion.

The Board members who were serving at the time the provision for precedent decisions was added to section 409 in 1967 seem to have been of the mind that the Board could do nothing more to a previously issued decision than to convert it into a precedent. This is shown by the provisions which that Board wrote into the Board's regulations (Title 22, California Administrative Code). In section 5117 of the Board's regulations, provision is made for writing of dissenting opinions in all matters except as to instances involving the raising of a previously issued decision to precedent status. This is a strong indication that the Board members at that time interpreted "previously issued decision" in section 409 as referring to decisions issued previously by the very same Board now considering whether to confer the mantle of precedent decision thereon. It is a cardinal rule of statutory construction that the interpretation adopted by those charged with administering a statute is entitled to great weight unless clearly erroneous (Union Oil Company v. State Board of Equalization, 60 Cal. 2d 441; Scott-Memorial Baptist Church v. Dept. of Alcoholic Beverage Control, 260 Cal. App. 2d 100). There is no indication of error on the part of that Board. Clearly, their interpretation harmonizes section 409 with section 1336, as they would be considering for precedent status a matter which they had previously decided by reviewing the evidence submitted.

It is equally clear that the project now undertaken by this Board cannot adhere to the mandate of section 1336, as there is no evidence which can be considered, all records of Benefit Decisions long ago having been purged. A number of the Benefit Decisions proposed by my colleagues for precedent status are flawed on their face. Some boldly state that "this decision is being adopted on the basis of the record herein." There is no record which this Board can consider. Some refer to oral argument, but none of

the members of this Board participated in such oral argument. Some incorporate by reference a Referee's decision, but no such decision exists.

Hence, whether sections 409 and 1336, taken together (as they must be) mean that a Board can raise to precedent status only a decision previously issued by that very Board, or mean that any previously issued decision can be elevated if the Board considering the elevation has read the record in the case, the proposed action by this Board must fail, as compliance cannot be had with either interpretation. Therefore, it appears the Board is committed to a journey into quicksand, as there exists no legal authority for the course contemplated. I would also raise the issues whether a statute or regulation which bars a member from writing a concurring or dissenting opinion is constitutionally valid.

The Board's records show that member Carl A. Britschgi and I voted to submit all of the above substantive and procedural issues and questions to the Attorney General for written opinion before the Board acted on any of these matters, but the other Board members disdained the seeking of an opinion from the Attorney General.

And, in their stampede to create a multitude of new precedent decisions and, for all practical purposes, banish any further use of the Benefit Decisions, the majority has adopted today a number of precedents without permitting any discussion of the merits of such decisions as to their precedent value. If for no other reason, this attitude of monarchial omnipotence sufficiently flouts the traditional principles of due process of law so as to invalidate the action taken by the majority.

The instant case is one of the "newest" of the Benefit Decisions, having been decided in 1967. Yet it has, on its face, several of the infirmities I have alluded to above. First, the decision is based in part on oral argument, in which no member of this Board participated. There is no record available for one to review. The Statement of Facts is based on 1966 Department procedures, and we do not know whether those same procedures are utilized by the Department today.

For all the above reasons, and for each of them, I must depart from my colleagues in their new venture and file this dissent.

HARRY K. GRAFE